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7                   UNITED STATES DISTRICT COURT  
8                   WESTERN DISTRICT OF WASHINGTON  
9                   AT TACOMA

10                   Cameron Pierce and Patricia  
11                   Pierce, husband and wife; Karen Kirby,  
12                   a single woman; Mary J. Ray, a single  
13                   woman, Gregory Sherman and  
14                   Paula Sherman, husband and wife,  
15                   Michael Lepage and Gertrude  
16                   Lepage, husband and wife; on behalf of  
17                   themselves and a class of similarly situated  
18                   individuals,

CASE NO. C05-5835RJB

ORDER AMENDING CLASS  
DEFINITION AND APPOINTING  
CLASS COUNSEL

Plaintiffs,

v.

NOVASTAR MORTGAGE, INC., a foreign  
corporation,

Defendant.

This matter comes before the Court on Defendant NovaStar Mortgage Inc.'s Memorandum of Law Regarding Class Definition (Dkt. 76) and Plaintiffs' Supplemental Submission Regarding the Court's Order Granting Plaintiffs' Renewed Motion for Class Certification (Dkt. 77). The Court has considered the pleadings filed in support of and in opposition to the filings and the file herein.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

The facts and procedural posture of this case were set forth in the Court's Order on the plaintiffs' first motion for class certification and need not be fully restated here. *See* Dkt. 60. The plaintiffs are all borrowers who engaged in loan transactions with defendant NovaStar and claim

1 to have been deceived by NovaStar's failure to disclose its payment of broker fees known as  
 2 "yield spread premiums" ("YSP"). The plaintiffs brought suit alleging that the failure to provide  
 3 written disclosure of the YSPs charged on their loans violated Washington's Consumer Protection  
 4 Act, 19.86 *et seq.*

5 The plaintiffs moved to certify a class of borrowers who were not provided written  
 6 disclosures. Dkt. 25. The Court denied the motion without prejudice. Dkt. 60. As invited by the  
 7 Court, the plaintiffs again moved to certify a class. Dkt. 61. The Court heard oral argument on the  
 8 motion and certified a class as follows:

9 [A]n opt-out class that includes every borrower satisfying the following requirements:

10 (1) the borrower entered into a federally-regulated mortgage loan that was subject  
 11 to the requirements of the Real Estate Settlement Procedures Act, 12 U.S.C.  
 12 §2601 *et seq.* ("RESPA") and secured by property within the State of Washington,  
 13 at any time from July 30, 1999, to the present;

14 (2) in connection with the transaction, NovaStar paid a yield spread premium  
 15 ("YSP") to the borrower's mortgage broker;

16 (3) in connection with the transaction, neither NovaStar nor the broker disclosed  
 17 to the borrower the YSP on a good faith estimate dated within three days of the  
 18 date on which NovaStar received the loan application; and

19 (4) in connection with the transaction, the borrower paid the mortgage broker  
 20 compensation in addition to the YSP that NovaStar paid to the broker.

21 Dkt. 74 at 11. The Court allowed the parties to propose amendments to the class definition to  
 22 determine whether borrowers with real property located outside of the Western District of  
 23 Washington should be excluded, whether the filing of *Tandiamra v. Novastar Mortgage*, No.  
 24 03-0909 (W.D.Wash. 2005), tolled the statute of limitations as to this case, whether a subclass  
 25 should be certified, and any remaining issues. *Id.* at 10-11. Both parties have proposed  
 26 amendments to the class definition.

## 27 II. DISCUSSION

### 28 A. PROPERTY LOCATED OUTSIDE THE WESTERN DISTRICT

29 In the Order Granting Plaintiffs' Renewed Motion for Class Certification, the Court  
 30 invited the parties to address whether the class definition raised personal jurisdiction concerns

1 because it did not exclude loans involving real property located outside of the Western District of  
2 Washington. Dkt. 74 at 10-11. The plaintiffs contend that the inclusion of such loans does not  
3 defeat the Court's personal jurisdiction. NovaStar does not address this aspect of the class  
4 definition.

5 Plaintiffs may consent to jurisdiction, and "opt out" procedures are generally a valid  
6 method of obtaining such consent. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812  
7 (1985); *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992) (applying *Phillips*  
8 *Petroleum* to federal court actions.). Whether the opt out procedure ultimately utilized by  
9 plaintiffs' counsel will be sufficient to bind class members over which the Court would not  
10 otherwise have personal jurisdiction is an issue not now before the Court. The definition of the  
11 class should not be modified to exclude loans pertaining to real property outside of the Western  
12 District of Washington.

13 **B. TOLLING OF THE STATUTE OF LIMITATIONS**

14 In the Order Denying Plaintiffs' Motion for Class Certification, the Court declined to rule  
15 whether the filing of *Tandlama* tolled the statute of limitations as to this case because the motion  
16 was decided on other grounds. Dkt. 60. In the Order on the Plaintiffs' Renewed Motion for Class  
17 Certification, the Court allowed the parties to propose, by subsequent motion, narrowing of the  
18 class on statute of limitations ground. Dkt. 74. The plaintiffs proposed that the class include loans  
19 entered into from July 30, 1999, to the present on the theory that the statute of limitations was  
20 tolled by the filing of the amended complaint in *Tandlama*. This date is premised upon the  
21 contention that the statute of limitations remained tolled after the motion to certify a class in  
22 *Tandlama* was denied on November 23, 2004, after the case was dismissed on November 8,  
23 2005, and until this case was filed on December 30, 2005. Recognizing that tolling applies only  
24 until the motion to certify in the previous case was denied, if at all, the plaintiffs now contend that  
25 the class definition should be changed to include loans entered into beginning September 4, 2000.  
26 Dkt. 79. This date would account for the lapse of time between the denial of class certification in  
27 *Tandlama* and the filing of the complaint in this case. *Id.*

Absent a clear indication that the filing of an attempted class action lawsuit tolls later suits seeking class certification in the Ninth Circuit, the Court should hold that this case was not tolled by the filing of *Tandiam*a. The class definition should be amended to include only loans entered into on or after December 30, 2001, four years before the complaint was filed in this case.

**C. SUBCLASS**

As currently defined, the class does not explicitly exclude secondary market transactions. The plaintiffs have invited the Court to certify a subclass to accommodate secondary market transactions or to leave the definition unchanged. NovaStar proposes no amendments in this regard. Having held that the determination of whether loans fall outside the scope of the class on the grounds that they constitute secondary market transactions does not defeat certification of a class, the Court should decline to certify a subclass or to modify the definition of the class with respect to secondary market transactions.

**D. TIMING OF DISCLOSURES**

As currently defined, the class includes loan transactions in which “neither NovaStar nor the broker disclosed to the borrower the YSP on a good faith estimate dated within three days of the date on which NovaStar received the loan application.” Dkt. 74 at 11. NovaStar contests this portion of the definition on two grounds:

First, NovaStar contends that NovaStar may rely upon brokers’ disclosures of yield spread premiums on good faith estimates and that such estimates need not be dated within three days of NovaStar’s receipt of the loan application. Second, Novastar contends that RESPA allows for disclosures by the lender within three days of receiving the loan application or at consummation of the loan, whichever is earlier. The plaintiffs agree with these contentions and propose changes to the definition that address these concerns. These proposed amendments should be adopted.

#### **E. ADEQUACY OF DISCLOSURES**

At oral argument, the Court inquired as to whether the plaintiffs intended to argue solely that NovaStar failed to disclose the YSP on good faith estimates altogether or whether the plaintiffs also claimed that the disclosures were sometimes present but inadequate. The plaintiffs make both claims and agree that changing “broker disclosed” to “broker adequately disclosed” would be proper. Dkt. 77 at 5. While NovaStar contends that this minor addition is unnecessary, the Court should amend the definition to account for disclosures that were provided within the requisite time period but were allegedly deficient in substance or in form. *See* Dkt. 78 at 2 (NovaStar’s response).

## **F. APPOINTMENT OF CLASS COUNSEL**

The plaintiffs request that the Court appoint plaintiffs' counsel as class counsel. Dkt. 77 at 5. NovaStar does not object, and the Court has previously held that plaintiffs' counsel appear able and willing to prosecute vigorously on behalf of the class. Dkt. 60 at 11. The Court should therefore appoint plaintiffs' counsel as class counsel.

### III. ORDER

Therefore, it is hereby

**ORDERED** that counsel of record for the class plaintiffs are appointed as class counsel and the definition of the class is **AMENDED** to read as follows:

An opt-out class that includes every borrower satisfying the following requirements:

(1) the borrower entered into a federally-regulated mortgage loan that was subject to the requirements of the Real Estate Settlement Procedures Act, 12 U.S.C. §2601 et seq. (“RESPA”) and secured by property within the State of Washington, at any time from December 30, 2001, to the present;

(2) in connection with the transaction, NovaStar paid a yield spread premium (“YSP”) to the borrower’s mortgage broker;

(3) in connection with the transaction, neither NovaStar nor the broker adequately disclosed to the borrower the YSP on a good faith estimate dated no later than three days after the date on which NovaStar received the loan application or, in the case of a loan application received fewer than three days before the borrower signed final loan documents, the date on which the borrower signed final loan documents; and

1                             (4) in connection with the transaction, the borrower paid the mortgage broker  
2                             compensation in addition to the YSP that NovaStar paid to the broker.

3                             The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel  
4                             of record and to any party appearing *pro se* at said party's last known address.

5                             DATED this 14<sup>th</sup> day of November, 2006

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8                             Robert J. Bryan  
9                             United States District Judge